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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-206

MANLEY INVESTMENT COMPANY,
Petitioner,

v.

THOMAS W. GARLAND, INC., AND THE CITY OF ST. LOUIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3567 at 456 (1975) 8, 9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Manley Investment Company ("Manley"), Petitioner herein, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on May 15, 1979.

OPINIONS BELOW

The Order and Memorandum Opinion of the District Court, filed on May 23, 1978, is reported at 450 F. Supp. 239, and is reproduced in Appendix A, *infra*. The original Opinion of the Court of Appeals for the Eighth Circuit, which reversed the

judgment of the District Court, is unreported and is reproduced in Appendix B, *infra*. The Court of Appeals' Modified Opinion is reported at 596 F.2d 784 and is reproduced in Appendix C, *infra*.

JURISDICTION

The opinion and judgment of the Eighth Circuit was filed on February 28, 1979. Manley's timely Petition for Rehearing was filed on March 23, 1979. On May 15, 1979 an Order was entered denying the Petition for Rehearing and substituting two pages in the original opinion. A copy of this Order is reproduced in Appendix D, *infra*. This Petition for a Writ of Certiorari was filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the power of pendent jurisdiction may be exercised over a plaintiff's state-law claim, asserted solely against a co-defendant, in the absence of an independent federal jurisdictional basis as to that claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the Constitution of the United States provides in relevant part:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

In pertinent part 28 U.S.C. § 1331(a) states:

> The District Courts shall have jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . .

STATEMENT OF THE CASE

Thomas W. Garland, Inc. ("Garland"), a Missouri corporation, instituted this action in the United States District Court for the Eastern District of Missouri on January 30, 1978. According to the averments of the complaint,[1] Garland has for many years operated a women's ready-to-wear store in St. Louis, Missouri ("City"). In December 1952, Garland entered into a thirty-year lease, the premises being located in downtown St. Louis. At this location Garland operates its retail store, headquarters, administrative offices, and shipping and receiving department. Since January, 1975, when Manley acquired the fee interest to the property leased to Garland, it has received the rental payments.

On June 29, 1971, the Board of Aldermen of the City of St. Louis passed an ordinance which declared a majority of downtown St. Louis, including the premises leased by Garland, to be blighted and in need of redevelopment. On April 5,

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[1] This statement of facts is based solely on the allegations in the complaint. Although Manley does not concede the truth of these factual averments, it recognizes that, when considering the propriety of a motion to dismiss, all material allegations must be accepted as true and interpreted favorably to the pleader. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

1973, the Board of Aldermen passed an ordinance approving a contract between Mercantile Redevelopment Corporation ("Mercantile") and the City whereby Mercantile agreed to redevelop the six-block area declared blighted in the June 29, 1971 ordinance.

On March 23, 1974, agents for Mercantile advised Garland that it would have to vacate the leased premises by September, 1974. According to Garland's complaint, with the exception of its own store and another building, the "business character" of the two-block area surrounding its premises was allegedly destroyed and the area has become blighted.

Garland's complaint contended that the City, by enacting the two ordinances and contracting with Mercantile, accomplished either an actual or *de facto* condemnation of its leasehold. It was alleged that this taking was without just compensation in violation of the Fifth and Fourteenth Amendments. Garland also asserted that, by virtue of the foregoing, its lease with Manley had become impossible of performance under Missouri contract law. As relief, Garland's complaint sought actual and consequential damages from the City; as to Manley, Garland sought a declaratory judgment that its lease was "terminated, null and void and of no effect."

Garland alleged that its cause of action arose under the Fifth and Fourteenth Amendments to the Constitution and that jurisdiction was conferred upon the District Court pursuant to 28 U.S.C. §1331.

Both Manley and the City filed motions to dismiss for failure to state a claim upon which relief could be granted and Manley also moved to dismiss for lack of jurisdiction. On May 23, 1978, the District Court dismissed Garland's action for failure to state a claim upon which relief could be granted (Appendix A).

Garland appealed the District Court's decision to the Court of Appeals for the Eighth Circuit. On February 28, 1979, the Court of Appeals reversed the judgment of the District Court, holding that the District Court had applied a too restrictive standard in dismissing Garland's claim of *de facto* condemnation against the City. As to Garland's claim against Manley, the Court of Appeals tersely held that "the action against Manley lacked an independent basis for federal court jurisdiction" and with the reinstatement of Garland's federal question claim against the City, "the absolute obstacle to entertaining pendent jurisdiction over plaintiff's action against Manley is removed." Accordingly, both claims were remanded to the District Court for further proceedings (Appendix B).

Both Manley and the City filed timely petitions for rehearing. Manley's petition requested that the Court of Appeals reconsider its decision remanding the claim against Manley to the District Court and pointed out that the Court's decision was an unwarranted extension of the doctrine of pendent jurisdiction. On May 15, 1979, the Court of Appeals denied the petitions for rehearing (Appendix D), but modified its original opinion as to the jurisdictional issue raised by Manley (Appendix C). In its modified opinion the Court of Appeals directed the District Court to determine, first, whether "it may exercise ancillary—i.e., pendent party jurisdiction over the state-law claim against Manley" and, secondly, whether a cause of action against Manley cognizable under Missouri law had been stated.

On remand, the District Court, on June 18, 1979, entered an order denying Manley's previously-filed motion to dismiss for lack of jurisdiction. The order, reproduced in Appendix E, does not reflect the court's determination whether the power of pendent jurisdiction extends to pendent parties (i.e., Manley) and, if so, whether it was choosing to exercise that discretionary power.

REASONS FOR GRANTING THE WRIT

It is virtually self-apparent and demonstrated herein that review on writ of certiorari should be granted in this case for there are special and important reasons therefor. First, the opinions of the Courts of Appeal on this vexing issue are in conflict; secondly, the opinion of the Eighth Circuit conflicts with two applicable decisions of this Court; thirdly, the decision raises a significant and recurring problem affecting the very touchstone of the federal judiciary—its jurisdiction.

I

The Eighth Circuit's Decision Conflicts With the Decisions of Other Courts of Appeal

This Court, pursuant to Supreme Court Rule 19(1)(b), should grant this petition for certiorari to resolve the irrefutable division among the Courts of Appeal on the "pendent party" question. Stated briefly, the issue presented for review is whether the power of pendent jurisdiction may be exercised over Garland's non-federal claim,[2] asserted against Manley, a co-defendant, in the absence of an independent federal jurisdictional basis as to that claim. Two circuits, the Ninth and Seventh, have repeatedly held that the pendent jurisdiction doctrine applies solely to claims and does not encompass pendent parties. *E.g., Ayala v. United States,* 550 F.2d 1196 (9th Cir. 1977), *cert. dismissed,* 435 U.S. 982 (1978); *Hampton v. City of Chicago,* 484 F.2d 602 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974); *Williams v. United States,* 405 F.2d 951 (9th Cir.

[2] As used throughout this Petition, the phrase "non-federal claim" means that there is no independent basis for federal jurisdiction. Conversely, a "federal claim" means that an independent basis for federal jurisdiction exists. *See Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 372, n. 11 (1978).

1969); *Wojtas v. Village of Niles,* 334 F.2d 797 (7th Cir. 1964), *cert. denied,* 379 U.S. 964 (1965).[3]

The following holding in *Hymer v. Chai,* 407 F.2d 136, 137 (9th Cir. 1969), illustrates succinctly the rationale of these opinions:

> Joinder of claims, not joinder of parties, is the object of the doctrine. It was not designed to permit a party without a federally cognizable claim to invoke federal jurisdiction by joining a different party plaintiff asserting an independent federal claim growing out of the same operative facts.

In contrast, four circuits, the First, Second, Third, and Tenth hold that pendent jurisdiction does extend to parties. *E.g., Ortiz v. United States,* 595 F.2d 65 (1st Cir. 1979); *Leather's Best, Inc. v. S.S. Mormaclynx,* 451 F.2d 800 (2d Cir. 1971); *Jacobson v. Atlantic City Hospital,* 392 F.2d 149 (3d Cir. 1968); *Transok Pipeline Co. v. Darks,* 565 F.2d 1150 (10th Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978).[4]

[3] Although these cases did not involve the precise factual situation presented here (i.e., asserting a state-law claim against a co-defendant when the federal claim against the other defendant is based on 28 U.S.C. §1331), the Ninth Circuit has made it clear that its objections to the exercise of pendent party jurisdiction are not dependent upon the precise statutory grant of federal jurisdiction in question. Rather, that circuit is of the view that the exercise of pendent party jurisdiction is constitutionally impermissible, regardless of whether the underlying federal claim is based on diversity or federal question jurisdiction. *Ayala v. United States, supra,* at 1200-01 & n. 3.

[4] Although many of these cases were decided before this Court's decisions in *Aldinger v. Howard,* 427 U.S. 1 (1976) and *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365 (1978), discussed *infra,* and involved situations in which the underlying federal claim was not based on 28 U.S.C. §1331, the rationale of these cases is broad, and would encompass a situation where jurisdiction was based on §1331. In two cases decided subsequent to *Aldinger* and *Owen, Transok Pipeline, supra,* and *Ortiz, supra,* the courts narrowly construed *Aldinger* and *Owen* and took an expansive view of the pendent party doctrine when the underlying federal jurisdictional statute was not one specifically considered in either *Aldinger* or *Owen.*

The state of law in the remaining circuits is unclear.[5]

Clearly, the inconsistent holdings of the Courts of Appeals on this threshold jurisdictional question should be resolved by this Court. This important issue of national significance begs for authoritative resolution to prevent a continuation of these inconsistent adjudications.

II

The Court of Appeals' Decision Is in Conflict With Applicable Decisions of This Court

Prior to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), it was universally held that the doctrine of pendent jurisdiction was properly invoked only if the pendent claim asserted involved the same parties as the federal claim upon which jurisdiction was premised. *E.g., Wojtas v. Village of Niles, supra; see* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3567 at 456 (1975). *Gibbs* expanded the doctrine of pendent jurisdiction by discarding the "cause of action" test laid down in *Hurn v. Oursler*, 289 U.S. 238 (1933), and substituted the following standards for determining when it is constitutionally permissible for a federal court to hear and determine a non-federal claim:

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[5] Prior to *Owen*, both the Fourth and Sixth Circuits had upheld the assertion of pendent party jurisdiction in suits where jurisdiction over the federal claim was based on diversity of citizenship. *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968); *F. C. Stiles Contracting Co. v. Home Ins. Co.*, 431 F. 2d 917 (6th Cir. 1970). These cases, of course, would not be controlling after *Owen*. The state of the law in the Fifth Circuit is uncertain. *Compare Fawvor v. Texas, Inc.*, 546 F.2d 636 (5th Cir. 1977) (pendent party jurisdiction denied in diversity suit) *with Connecticut General Life Ins. Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968) (pendent party jurisdiction allowed in suit arising under §301 of the Labor Management Relations Act, 29 U.S.C. §185). The District of Columbia Circuit has yet to decide the question.

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," U.S. Const., Art. III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. * * * The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues there is *power* in federal courts to hear the whole. *Id.* at 725.

Gibbs, however, concerned the assertion by a single plaintiff of both federal and non-federal claims against a *single* defendant. Thus, *Gibbs* does not require, or even suggest, a departure from the pre-existing rule that pendent jurisdiction pertained only to pendent claims and not to pendent parties.

Subsequent to *Gibbs*, numerous federal courts decided cases which led to a "wholly unexpected consequence of *Gibbs*." 13 C. Wright, A. Miller & E. Cooper, *supra*, at § 3567 at 456. These courts decided, contrary to the well-established prior law, that the *Gibbs* test for determining the constitutionality of exercising pendent jurisdiction should be applied, without any further analysis, to allow a plaintiff to bring suit against a defendant on a non-federal claim whenever the plaintiff sued another defendant on federal and non-federal claims which arose out of "a common nucleus of operative fact". For the most part, these cases failed to recognize that *Gibbs* did not concern the joinder of another party which was not otherwise subject to federal jurisdiction. *See, e.g., Jacobson v. Atlantic City Hospital*, 392 F.2d 149 (3d Cir. 1968).

Regrettably, the opinion in this case, with myopic indifference, continues this trend and fails to recognize that two decisions of this Court compel a different result.

In *Aldinger v. Howard*, 427 U.S. 1, 14 (1976), this Court specifically rejected the notion that *Gibbs* alone is sufficient authority to exercise the power of pendent jurisdiction as to a defendant against whom *only* a non-federal claim is asserted:

> The situation with respect to the impleading of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal Court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact."

This rationale was reiterated in *Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365 (1978):

> It is apparent that *Gibbs* delineated the constitutional limits of federal judicial power. . . . Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but by Acts of Congress. *Id.* at 371-72.

Thus, it is apparent from this Court's holdings in *Owen* and *Aldinger* that rather than merely relying in rote fashion upon the "constitutional minimum" test of *Gibbs*, a more searching inquiry must be undertaken before it may properly be concluded that a court may exercise "pendent party" jurisdiction. These two opinions command that the following three-part inquiry be undertaken:

> Beyond this constitutional minimum [the *Gibbs* test], there must be an examination of the posture in which the non-federal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular non-federal claim. *Aldinger v. Howard, supra*, at 18. *Owen, supra*, at 373.

Thus, in order to assert a pendent party claim this tripartite test requires first, as a constitutional requisite, that the state claim asserted bear a sufficient legal and factual nexus to the federal claim; secondly, that the factual and procedural context in which the state claim is asserted is similar to other situations in which courts sanction the assertion of federal jurisdiction over a non-federal claim (i.e., ancillary jurisdiction); thirdly, that the statute establishing federal jurisdiction evidence a Congressional intent to permit the assertion of jurisdiction over the state claim.

In this case, after holding that Garland's claim against the City should be reinstated, the opinion which is devoid of any analysis on this issue, tersely states: "one of the obstacles to entertaining jurisdiction over plaintiff's action against Manley is removed." 596 F.2d at 789 (Appendix C at A-24-25) [footnote omitted]. Instead of undertaking the three-part analysis mandated by *Owen* and *Aldinger*, this case was remanded to the District Court to consider whether it could, and should, assume jurisdiction over Garland's state-law claim against Man-

ley. Had the Court of Appeals and subsequently the District Court followed the dictates of *Owen* and *Aldinger*, they would have been compelled to conclude that the tripartite test for exercising pendent party jurisdiction is not fulfilled in this case. The proper application of ths Court's tripartite test admits of no other conclusion.

First, the exercise of pendent jurisdiction in this case is unconstitutional under the *Gibbs* test. As noted, *Gibbs* held that pendent jurisdiction is constitutionally permissible whenever the federal and non-federal claims comprise but one "constitutional case," in that they derive from "a common nucleus of operative fact" and are such that the plaintiff would normally be expected to try them all in one proceeding. 383 U.S. at 725. The claims against Manley and the City do not "comprise but one constitutional case." Although it is arguable that certain facts are relevant to both claims, the "operative facts" necessary to establish a taking of Garland's leasehold by the City in violation of the Fourteenth Amendment[6] are uncommon with those facts required to prove impossibility of performance or frustration of purpose as to the lease with Manley. Moreover, an action seeking money damages for inverse condemnation and one for equitable cancellation of a lease would not ordinarily be tried together.

The claims against the City and Manley are dissimilar and do not comprise one case for the further reason that Garland has requested a jury trial on all issues in the District Court. Because Garland's equitable claims are not properly triable before a jury, *e.g., Howard v. United States*, 214 F.2d 759, 762 (10th Cir. 1954), its equitable action against Manley must

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[6] Garland stated no claim against Manley arising under the Fourteenth Amendment, because Manley is a private party and there is, therefore, no manifestation of "state action" sufficient to invoke the protections of the Fourteenth Amendment. *E.g., Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

be heard separately from its legal action against the City. Hence, as there are two cases, not even the otherwise laudatory purpose of judicial economy is served by pending the claims against Manley to those against the City. Therefore, it is clear that Garland's claim against Manley does not even meet the "constitutional minimum" standard for exercising pendent jurisdiction.

Secondly, in "examining the posture in which the non-federal claim is asserted," it is clear that the non-federal claim in this case is not merely ancillary to the federal cause. Garland alleges that the "business character" of the area encompassing its store has been destroyed, its sales have declined, and hence, its lease is valueless. This claim is obviously independent from its assertion that the City has condemned Garland's leasehold without just compensation. There is no legal nexus whatsoever between the theories of impossibility of performance and inverse condemnation. Furthermore, in contrast to third-party claims, Garland's claim against Manley is not dependent upon establishing the liability of the City.

Also, it must be noted that Garland's non-federal claim is within the precise ambit of the holding of this Court in *Owen* in which the claim was also:

> asserted by the plaintiff, who voluntarily chose to bring suit upon the state-law claim in a federal court. By contrast, ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court. A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims. . . . *Owen, supra*, at 376.

Thus, it is clear that the claims against Manley are not within the court's ancillary jurisdiction which usually extends

only to compulsory counterclaims, impleader, cross-claims, and intervention as of right, *Owen, supra,* at 375 n.18. Additionally, Garland's claims against Manley are not amongst those ancillary claims which are typically described in the Federal Rules of Civil Procedure. *E.g.*, Rules 13(a), 13(g), 14, and 24(a). Further, the Federal Rules of Civil Procedure do not expressly permit the "pending" of a party which would improperly expand the jurisdiction of federal courts contrary to Rule 82 which states: "These rules shall not be construed to extend or limit the jurisdiction of United States District Courts. . . ." Accordingly, courts have not permitted jurisdictional prerequisites to be circumvented by invocation of the rules. *E.g., Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F.2d 890, 893 (4th Cir. 1972) (plaintiff cannot assert claim directly against third-party defendant absent independent basis of subject matter jurisdiction). Thus, Garland's claims against Manley are not cognizable as being within the ancillary jurisdiction of the federal court.

Thirdly, by examining the "specific statute that confers jurisdiction over the federal claim," in this case 28 U.S.C. §1331 (a), a Congressional policy becomes evident. Similar to all civil *actions* initiated under 28 U.S.C. §1332, which requires complete diversity between plaintiff and defendant, *Owen, supra,* §1331(a) applies to civil *actions* and requires that the "*matter* in controversy" arise "under the Constitution, laws or treaties of the United States. . . ." While both statutes are addressed to the cause of action, only §1332 is concerned with the parties. The narrower focus of §1331(a) is the "matter in controversy," that is, Garland's claim against Manley. As the Court of Appeals' opinion conceded, no federal claim is stated against Manley. 596 F.2d at 789 (Appendix C at A-24). Accordingly, §1331(a) is not applicable to this case. The plain language of §1331(a) admits of no other interpretation.

The opinion of the Court of Appeals in this case cannot be harmonized with the principles enunciated by this Court in

Owen and *Aldinger*. By failing to apply the three-part analysis of *Owen* and *Aldinger*, the Court of Appeals misapplied the doctrine of pendent jurisdiction and this Court should issue its writ of certiorari to review the Eighth Circuit decision.

III

The Court of Appeals' Decision Raises a Significant and Recurring Problem Concerning Federal Jurisdiction

Although it seems entirely clear from the preceding discussion that the principles enunciated in *Owen* and *Aldinger* compel a reversal of the Court of Appeals' decision in this case, *Owen* and *Aldinger* dealt with the propriety of exercising pendent party power when jurisdiction over the underlying federal claims was based on 28 U.S.C. § 1332 and 28 U.S.C. § 1343, respectively. As the Court of Appeals in this case noted, 596 F.2d at 789 n.4 (Appendix C at A-24n.4), those decisions did not deal specifically with the situation in which federal jurisdiction is invoked under the "federal question" statute, 28 U.S.C. § 1331(a). Therefore, to dispel any lingering uncertainty as to the scope of *Owen* and *Aldinger*, and to provide needed guidance to lower federal courts, this Court should grant this petition for certiorari.

In addition to the Court of Appeals' oblique request for guidance on this question, a recent case decided by this Court indicates that the pendent party problem continues to plague lower courts, even after *Aldinger* and *Owen*. In *Symm v. United States*, — U.S. —, 59 L.Ed. 2d 66 (1979), the United States filed suit against the State of Texas, a county therein, and its voting registrar, seeking to enjoin the use of a questionnaire used to determine whether persons registering to vote were *bona fide* residents. A three-judge District Court issued the injunction, but the injunction ran only against the registrar (Symm) per-

sonally. On appeal, this Court summarily affirmed the District Court opinion. Justice Rehnquist, joined by the Chief Justice, dissented. Even though no question as to jurisdiction had been raised below, Justice Rehnquist believed that the District Court's assertion of jurisdiction over the claim against Symm was "demonstrably wrong under *Aldinger*, supra, and *Owen*, supra." Justice Rehnquist noted that the United States' claims against the state and county properly invoked federal jurisdiction under 42 U.S.C. § 1973bb, but that the statute was limited to suits "against States or political subdivisions." Applying the three-part test of *Aldinger* and *Owen*, Justice Rehnquist found that the District Court could not properly exercise "pendent party" jurisdiction over Symm personally, and would have reversed the District Court. Thus, as illustrated in *Symm*, lower federal courts are in need of further guidance in relation to the "pendent party" question.

The unwarranted expansion of the concept of federal question jurisdiction is particularly vexing for federal courts, being courts of limited jurisdiction, *e.g., Aldinger v. Howard, supra; Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), are empowered only to hear those cases that are both within the judicial power of the United States, as defined by Article III, § 2 of the Constitution, and that have been entrusted to them by a jurisdictional grant of the Congress. *E.g., Moor v. County of Alameda*, 411 U.S. 693, 715 (1973); *Barry v. Mercein*, 5 How. (46 U.S.) 103, 119 (1847); *Turner v. Bank of North America*, 4 Dall. (4 U.S.) 8, 10 (1799). Accordingly, federal courts must "scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Victory Carriers v. Law*, 404 U.S. 202, 212 (1971); *Healy v. Ratta*, 292 U.S. 263, 270 (1934). A critical examination of the scope of federal jurisdiction is particularly warranted in this case because Garland's claim against Manley derives solely from state law. As this Court noted in *Victory*

Carriers, supra, at 212, when the effect of affording a plaintiff a cause of action in federal court would be to intrude on an area that was previously reserved for state law, courts should "proceed with caution" in construing both constitutional and statutory grants of jurisdiction to federal courts. The Court of Appeals proceeded with anything but caution in this case, and in so doing, ignored both the constitutional and statutory limitations on the power of federal courts. Hence, this Court should issue a writ of certiorari to review the decision of the Court of Appeals.

This Court should also grant the petition for the Court has broad responsibility to supervise the administration of justice in the lower federal courts. *E.g., Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 260 (1953). Few, if any, questions are more basic to the proper administration of justice than the *power* of a federal court to adjudicate particular controversies, particularly since such jurisdictional questions take on importance in this modern era of expanding federal court dockets.[7] By permitting Garland to join non-federal claims against Manley, a party not otherwise subject to federal jurisdiction, the Court of Appeals' opinion in this case encourages the filing of suits in federal, rather than state, courts. *See Kroger v. Owen Equip. & Erection Co.*, 558 F.2d 417, 432 (8th Cir. 1977) (Bright, J., dissenting). Because the Court of Appeals' opinion will adversely affect the work load of the federal courts and further deplete the presently strained resources of the federal judiciary, review by this Court is certainly warranted.

Furthermore, in an era when this Court has demonstrated increasing sensitivity to principles of federalism and recognized

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[7] For the year ending June 30, 1978, the number of cases pending in the district courts increased 8.4% over the preceding year. Administrative Office of the United States Courts, *1978 Annual Report of the Director*, Table 15, p. 58.

the importance of state judicial proceedings in maintaining that federal system,[8] the decision of the Eighth Circuit in this case, which will inevitably and unnecessarily embroil federal courts in deciding questions of state law, should be analyzed closely.

Finally, as the vital issue presented herein is raised solely upon the initial pleadings,[9] this case is presented to the Court in its most unencumbered form, permitting its resolution to provide the utmost guidance to both litigants and the federal courts.

CONCLUSION

For the above reasons, this Honorable Court should issue its writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Manley Investment Company

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[8] *E.g., Moore v. Sims,* 47 U.S.L.W. 4693 (U.S. June 11, 1979); *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Juidice v. Vail,* 430 U.S. 327 (1977); *Stone v. Powell,* 428 U.S. 465 (1976).

[9] As this Court has previously noted, the question whether a court has pendent jurisdiction power under Art. III, §2, will ordinarily be resolved on the pleadings. *United Mine Workers v. Gibbs, supra,* at 727.

APPENDIX

APPENDIX A

THOMAS W. GARLAND, INC., Plaintiff
v.
The CITY OF ST. LOUIS and Manley Investment Company, Defendants.

No. 78-129C(3).

United States District Court, E. D. Missouri, E. D.

May 23, 1978.

* * * * * * *

MEMORANDUM

NANGLE, District Judge.

This matter is before the Court upon separate motions of defendants City of St. Louis and Manley Investment Company to dismiss plaintiff's complaint. Plaintiff has filed this suit, pursuant to 28 U.S.C. § 1331, seeking declaratory and monetary relief for an alleged taking of plaintiff's property.

Plaintiff's complaint alleges that on November 28, 1952, it entered into a lease of premises in the City of St. Louis for a term of thirty years, expiring December 4, 1982, at which it operates a retail store. On June 29, 1971, the Board of Aldermen of the City of St. Louis passed an ordinance providing that an area of the City, including plaintiff's leased premises, was blighted and should be redeveloped. On April 5, 1973, the Board of Aldermen passed an ordinance providing for a contract between the City and Mercantile Redevelopment Corporation. Under the provisions of the contract between these

parties, Mercantile was to undertake a redevelopment of six city blocks, previously declared blighted, which included the block on which plaintiff's premises are located. The ordinance further provided for the vacating of St. Charles Street as a public thoroughfare, a street used by plaintiff as the only means of ingress of commercial deliveries. The ordinance further granted to Mercantile the power to condemn property within the development area and provided that the City could exercise the power of condemnation within the redevelopment area.

On March 23, 1973, plaintiff alleges, agents for Mercantile advised plaintiff's officers that the leased premises would have to be vacated by September, 1974. Relying upon said statements, plaintiff proceeded to search for new premises. Plaintiff was unable to locate any suitable property in the downtown area of the City and instead relocated in three areas. It leased premises in West St. Louis County for its headquarters office, administrative offices, shipping and receiving functions and fur storage vault. To provide services for customers in Illinois who previously shopped in plaintiff's City facility, plaintiff leased a facility in Fairview Heights, Illinois. In order to provide a facility for customers south of the City, plaintiff leased facilities in South St. Louis County, Missouri.

Plaintiff alleges that defendant Manley Investment Co., as agent for Mercantile, began to acquire ownership of property in the area in 1973 and 1974. With the exception of plaintiff's store and a building south of plaintiff's store, the two-block area surrounding plaintiff's premises was stripped of its business and commercial enterprises. As a result, plaintiff alleges, the area has become blighted and the business character of the area has been destroyed. Sales have declined. Plaintiff alleges that there has been no further redevelopment because of a lack of proper financing.

Plaintiff asserts that it has been deprived of the full use and benefit of its leasehold interest. Plaintiff contends that there

has been a de facto taking of its leasehold interest as of April 1, 1974 and that it should be compensated therefor. Plaintiff further alleges that there is an impossibility of performance of its lease because of the actions of the City. Accordingly, it prays for monetary judgment against defendant City of St. Louis, as compensation for the taking of its leasehold interest and consequential damages allegedly resulting. Plaintiff further prays for a declaration that the lease between plaintiff and defendant Manley Investment Company is terminated, null and void.

The crux of plaintiff's complaint is that the actions of defendant City have resulted in a taking of plaintiff's leasehold interest without just compensation therefor, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Both defendants have filed motions to dismiss for failure to state a claim. Additionally, defendant Manley Investment Company asserts that this Court lacks jurisdiction as to the claim involving said defendant.

The general rule is that "[t]he mere enactment of legislation which authorizes condemnation of property cannot be a taking". *Danforth v. United States*, 308 U.S. 271, 286, 60 S.Ct. 231, 237, 84 L.Ed. 240 (1939). In response to the impact that the pendency of such proceedings may have upon an area, however, courts have considered the delay and inaction of the condemning authority in determining the date for the valuing of the property condemned. See *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974); 4 Nichols on Eminent Domain § 12.3151[5].

In *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964), however, the court held that the actions of the City may amount to a de facto taking of the property at a date prior to condemnation date. In *Foster*, the City had instituted condemnation proceedings. The use and management of the property had been frozen

during the pendency of the proceedings. After tenants had vacated and the condition of the plaintiff's buildings had deteriorated, the City notified the plaintiff that the buildings would have to be demolished at the plaintiff's expense. Approximately two years later, or ten years after the condemnation proceedings were instituted, the City dismissed the condemnation proceedings. Thereafter, the City again started condemnation proceedings under the Federal Urban Renewal Program, under which the appraised value of the property would be based upon the condition of the property as it then existed, without buildings and in its depreciated state. The court held that the district court had jurisdiction, pursuant to 28 U.S.C. § 1331, to hear plaintiff's claim that his Fourteenth Amendment rights had been violated in that he had been deprived of his property without due process of law.

Since that decision, however, the Sixth Circuit has limited the circumstances in which the *Foster* holding may be applied. In *Sayre v. City of Cleveland, supra,* the City notified the property owner of its intention to obtain certain parcels of property. A resolution was passed declaring such intention and written notices were issued. The City, however, never acquired the property. The court held that:

> . . . absent the extreme circumstances present in the *Foster* case, but lacking here, we think the true rule is that there is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties. *Id.* at 70.

The court further noted that in those cases in which a de facto taking was found, there was "a physical entry by the condemnor, or a physical ouster of the owner, or a legal interference with the physical use, possession or enjoyment of the property or legal interference with the owner's power of disposition

of the property." *Id.* quoting from *City of Buffalo v. J. W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971). See also *Woodland Market Realty Company v. City of Cleveland*, 426 F.2d 955 (6th Cir. 1970); 4 Nichols on Eminent Domain § 12.3151[5].

It is clear that plaintiff has failed to state a claim herein. Plaintiff does not allege that there has been any physical entry or legal interference with its use or disposition of the property. All that plaintiff asserts is the threat of condemnation, its impact upon the area, and its impact upon the business activities of plaintiff. While such facts may affect the date determined for the valuation of the property in any subsequent condemnation proceedings, such assertion is insufficient to state a claim herein. *Cf., City of Buffalo v. Clement, supra.*

Accordingly, defendants' motions will be granted.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 78-1554

Thomas W. Garland, Inc.,
Appellant,
v.
The City of St. Louis and Manley Investment Company,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: December 15, 1978
Filed: February 28, 1979

Before HEANEY and ROSS, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

ROSS, Circuit Judge.

Plaintiff, Thomas W. Garland, Inc. (Garland), operates a retail clothing store on leased premises in the downtown business area of St. Louis, Missouri. In its complaint, filed January 30, 1978, Garland alleges that condemnation proceedings originating in April 1973 by the city of St. Louis have effected a de facto taking of plaintiff's leasehold for which plaintiff seeks just compensation under the fifth and fourteenth amendments to the Constitution. Garland joined Manley Investment

* The Honorable TALBOT SMITH, Senior United States District Judge, Eastern District of Michigan, sitting by designation, participated in the post-argument conference and concurred in the decision resulting in this opinion prior to his death on December 21, 1978.

Company (Manley) as a defendant in this action, as owner of the fee interest in the leased property, and alleges that the lease has become frustrated or impossible to perform and should be cancelled because of the city's de facto condemnation of the leasehold.

In May 1978 the district court[1] sustained the motions of both defendants to dismiss the complaint for failure to state a claim for relief, FED. R. CIV. P. 12(b)(6). We reverse and remand for additional proceedings.

I

The complaint alleges that in June 1971, the city's Board of Aldermen passed Ordinance 55952 declaring an area of the city including plaintiff's leased premises blighted, and redevelopment of the area necessary. In April 1973, Ordinance 56476 was passed, designating Mercantile Center Redevelopment Corporation (Mercantile) as developer, approving a redevelopment plan submitted by Mercantile, incorporating a contract between the city and Mercantile and delegating to Mercantile the power of eminent domain for the purpose of carrying out the contract. The development agreement also provided for vacation of a street which had served as the only entrance to Garland's shipping and receiving dock behind the leased building.

Garland further alleges that in March 1973, agents for Mercantile ordered Garland to vacate its premises by September 1974 and that relying on this statement and public announcements concerning the redevelopment project, Garland leased other premises for its administrative offices, fur storage and shipping and receiving functions, as well as additional proper-

[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

ties to be used as retail stores, all of such accommodations made at considerable expense.

Between 1973 and 1975 defendant Manley, as Mercantile's agent, acquired the fee interest in plaintiff's leased property and others in the area. Surrounding buildings were demolished by use of a "headache ball." Part of the two-block area surrounding plaintiff's premises has been converted to a parking lot, and part now consists of vacant buildings. Plaintiff asserts that the two-block area has been stripped of its business and commercial character, rendering plaintiff's leasehold useless.

In June 1978, plaintiff was denied leave to file an amended complaint. The proposed amendment sets forth greater detail concerning the impact on plaintiff's operations resulting from the acts of Manley, Mercantile and the city, alleging that the "headache ball" has caused structural damage to plaintiff's building. Debris from the demolition of surrounding buildings has blocked the entrance to plaintiff's loading dock, clogged its air conditioning system and covered its merchandise with dust. Doorways and sidewalks in the vicinity are not cleared of snow, ice and garbage, and pedestrians no longer frequent plaintiff's area.

Plaintiff contends that after destroying the economic value of the district, leaving plaintiff under a "cloud of condemnation" for five years and rendering plaintiff's leasehold useless, the city and Mercantile ceased redevelopment plans because the entire project had been inadequately financed. The city had failed to secure a detailed financing plan from Mercantile as required by Section 29.080(15), Revised Code of St. Louis. Furthermore, although it was required under provisions of the City Charter to begin condemnation proceedings within six months after the effective date of the redevelopment ordinances and although its agents told plaintiff to vacate the premises, the city has failed to commence official condemnation of plaintiff's leasehold.

II

We review the dismissal of plaintiff's complaint in light of the following standards:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> * * * * * * *
>
> [A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precision all elements that give rise to a legal basis for recovery. Finally, a complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action. That determination is properly made on the basis of proof and not merely on the pleadings.
>
> The question, therefore, is whether in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Jackson Sawmill Co. v. United States, 580 F.2d 302, 306 (8th Cir.) (citations omitted), *petition for cert. filed*, 47 U.S.L.W. 3278 (U.S. Oct. 24, 1978) (No. 75-585).

The district court dismissed the complaint because plaintiff had failed to allege any physical invasion or appropriation of the property, stating:

> It is clear that plaintiff has failed to state a claim herein. Plaintiff does not allege that there has been any *physical entry* or *legal interference with its use or disposition of the property*. All that plaintiff asserts is the threat of condemnation, its impact upon the area, and its impact upon the business activities of plaintiff. While such facts may affect the date determined for the valuation of the property in any subsequent condemnation proceedings, such assertion is insufficient to state a claim herein.

(Emphasis added.) We do not agree with the district court that physical invasion or appropriation of the property is essential to a claim of de facto condemnation.

While the mere declaration of blight and other initial steps authorizing condemnation, even if they result in a decline in property values, do not constitute a taking requiring compensation to the property owner, *Danforth v. United States*, 308 U.S. 271, 286 (1939), governmental action short of acquisition or occupancy may constitute a constructive or de facto taking "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). *See also Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327 (9th Cir. 1977):

> When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid. * * *
>
> > "[T]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference with or disturbance of property

> > rights. * * * Nor need the government directly appropriate the title, possession or use of the properties. . . ."

Id. at 1330 (citations omitted).

In *Richmond*, the claimant's property was located within the area declared blighted by the city and designated for redevelopment. The redevelopment project was given wide publicity; a schedule for purchase of the subject properties was established, and the city's redevelopment agency began acquisition and demolition in the project area. As a result, property insurance and loan funds for improvements on the subject properties became unavailable. The claimant suffered damage to its building and a serious decline in rental income. After redevelopment ceased for lack of funds, the Ninth Circuit found that a compensable taking of the claimant's property had occurred because the actions of the city and its agency had rendered the property unsaleable in the open market and "its use for its intended purposes * * * severely limited." *Id.* at 1330.[2]

In *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964), the Sixth Circuit faced similar facts and reversed the lower court's dismissal of the complaint for failure to state a claim. The district court in the present action noted the *Foster* decision but con-

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[2] [A]s a result of Agency action, Elks' property was rendered unsaleable in the open market; its uses were severely limited by Agency; commercial lenders refused to make loans on the subject property; and Elks' peaceful enjoyment and its right to all rents and profits from the property were substantially impaired. *Given these consequences of Agency action, we conclude that Agency's interference with Elks' property rights was direct and substantial, and that the result of this interference was a significant reduction in the value of the subject property.* Therefore, we hold that Agency effected a compensable taking under the Fifth and Fourteenth Amendments of the United States Constitution.

Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327, 1331 (9th Cir. 1977) (emphasis added).

sidered it overruled or substantially restricted by two subsequent Sixth Circuit cases, *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir.), *cert. denied*, 419 U.S. 837 (1974), and *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir. 1970).

The district court cited the following language in *Sayre*:

> [A]bsent the extreme circumstances present in the *Foster* case, but lacking here, we think the true rule is that there is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties.

Sayre v. City of Cleveland, supra, 493 F.2d at 70. However, in *Sayre* and *Woodland*, the subject properties had *not* been designated for acquisition and were merely adjacent to but *outside* of the redevelopment area. In *Sayre*, the Sixth Circuit explained the significance of the property's location in determining whether property has been constructively condemned:

> *Woodland Market* acknowledges the authority of the legislative body to draw its own lines around the property it wishes to condemn by eminent domain. And the crucial geographic boundary is not that around the general planning area or the project area, *but around the property that the city has demonstrated that it intends to appropriate.* Absent the abuse of eminent domain found in *Foster, including some action by the city indicating that the particular piece of property at issue is to be appropriated,* economic loss caused by urban renewal does not constitute a taking within the meaning of the fifth and fourteenth amendments.

Id. at 69 (emphasis added).

In *Clinton Street Greater Bethlehem Church v. City of Detroit*, 484 F.2d 185 (6th Cir. 1973), the Sixth Circuit further explained the scope of its prior ruling in *Foster v. Herley, supra*, and the *Foster* decision on remand, *Foster v. City of Detroit*, 254 F.Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968):

> The *important distinction between the appellant's alleged harm and the problems encountered by Mr. Foster is that all of Mr. Foster's problems stemmed from his being subject to the 1950 condemnation action. See* 330 F.2d at 88. The affirmative acts of the City which led the District Court to conclude that a taking had occurred prior to 1962 were all actions taken by the City in accordance with a condemnation action which it later abandoned, and including informing Mr. Foster that he would receive no compensation for improvements, advising him only to "keep the roof on and the water running"; requiring him to sign a waiver of claim for damages as a condition precedent to the issuance of a building permit (but waiving any claim to the increased value of the property as a result of the proposed improvements), completing the condemnation and clearance of several blocks in the area, and keeping the notice of lis pendens in effect for five years after the issuance of the stop order on the project, while at the same time, telling those who inquired that the property would be condemned soon. 254 F.Supp. at 662.
>
> None of these factors pertain to this appellant, since this appellant was not subject to the 1950 condemnation action.

Clinton Street Greater Bethlehem Church v. City of Detroit, supra, 484 F.2d at 188 (emphasis added). *See also Benenson v. United States*, 548 F.2d 939, 947-52 (Ct.Cl. 1977); *Drakes*

Bay Land Co. v. United States, 424 F.2d 574, 584 (Ct.Cl. 1970).

We therefore find that the district court's interpretation of the requirements for a claim of de facto condemnation were too restrictive. Accordingly, we remand with directions to reinstate plaintiff's claim against the city for resolution on its merits.[3]

II

The district court did not specify its reasons for dismissing plaintiff's claim against Manley. However, the action against Manley lacked an independent basis for federal court jurisdiction, and the federal claim against the city was dismissed before trial. Thus presumably the district court relied on the Supreme Court's statement in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

Because we reinstate Garland's claim against the city, the absolute obstacle to entertaining jurisdiction over plaintiff's action against Manley is removed. The district court, in the exercise of its discretion, is free to determine whether it should assume pendent jurisdiction over the state law claim against Manley in light of the guidelines established in *Owen Equip. and Erection Co. v. Kroger*, 46 U.S.L.W. 4732 (U.S. June 21, 1978), and

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[3] We suggest that on remand plaintiff should be permitted to file its amended complaint. In addition, we direct that on remand, the district court shall resolve the issue of the city's liability, if any, for the acts of Mercantile. The city disclaims any liability for the alleged de facto condemnation or abuse of the power of eminent domain, contending that its delegation to Mercantile of the power to condemn the subject property absolved the city of any further responsibility. Garland contends that Mercantile acted at all times as the city's agent.

Aldinger v. Howard, 427 U.S. 1 (1976). If the court elects to exercise pendent jurisdiction, it must decide whether under the Missouri law of frustration of purpose or impossibility of performance, plaintiff has stated a claim for cancellation of the remainder of its lease.

Reversed and remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT

APPENDIX C

Thomas W. Garland, Inc., Appellant,

v.

The City of St. Louis and Manley Investment Company, Appellees.

No. 78-1554.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 15, 1978.

Decided Feb. 28, 1979.

As Amended on Denial of Rehearing and Rehearing En Banc May 15, 1979.

* * * * * * *

Before HEANEY and ROSS, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

ROSS, Circuit Judge.

Plaintiff, Thomas W. Garland, Inc. (Garland), operates a retail clothing store on leased premises in the downtown business area of St. Louis, Missouri. In its complaint, filed January 30, 1978, Garland alleges that condemnation proceedings originating in April 1973 by the city of St. Louis have effected

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* The Honorable TALBOT SMITH, Senior United States District Judge, Eastern District of Michigan, sitting by designation, participated in the post-argument conference and concurred in the decision resulting in this opinion prior to his death on December 21, 1978.

a de facto taking of plaintiff's leasehold for which plaintiff seeks just compensation under the fifth and fourteenth amendments to the Constitution. Garland joined Manley Investment Company (Manley) as a defendant in this action, as owner of the fee interest in the leased property, and alleges that the lease has become frustrated or impossible to perform and should be cancelled because of the city's de facto condemnation of the leasehold.

In May 1978 the district court[1] sustained the motions of both defendants to dismiss the complaint for failure to state a claim for relief, Fed.R.Civ.P. 12(b)(6). We reverse and remand for additional proceedings.

I

The complaint alleges that in June 1971, the city's Board of Aldermen passed Ordinance 55952 declaring an area of the city including plaintiff's leased premises blighted, and redevelopment of the area necessary. In April 1973, Ordinance 56476 was passed, designating Mercantile Center Redevelopment Corporation (Mercantile) as developer, approving a redevelopment plan submitted by Mercantile, incorporating a contract between the city and Mercantile and delegating to Mercantile the power of eminent domain for the purpose of carrying out the contract. The development agreement also provided for vacation of a street which had served as the only entrance to Garland's shipping and receiving dock behind the leased building.

Garland further alleges that in March 1973, agents for Mercantile ordered Garland to vacate its premises by September 1974 and that relying on this statement and public announcements concerning the redevelopment project, Garland leased

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[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

other premises for its administrative offices, fur storage and shipping and receiving functions, as well as additional properties to be used as retail stores, all of such accommodations made at considerable expense.

Between 1973 and 1975 defendant Manley, as Mercantile's agent, acquired the fee interest in plaintiff's leased property and others in the area. Surrounding buildings were demolished by use of a "headache ball." Part of the two-block area surrounding plaintiff's premises has been converted to a parking lot, and part now consists of vacant buildings. Plaintiff asserts that the two-block area has been stripped of its business and commercial character, rendering plaintiff's leasehold useless.

In June 1978, plaintiff was denied leave to file an amended complaint. The proposed amendment sets forth greater detail concerning the impact on plaintiff's operations resulting from the acts of Manley, Mercantile and the city, alleging that the "headache ball" has caused structural damage to plaintiff's building. Debris from the demolition of surrounding buildings has blocked the entrance to plaintiff's loading dock, clogged its air conditioning system and covered its merchandise with dust. Doorways and sidewalks in the vicinity are not cleared of snow, ice and garbage, and pedestrians no longer frequent plaintiff's area.

Plaintiff contends that after destroying the economic value of the district, leaving plaintiff under a "cloud of condemnation" for five years and rendering plaintiff's leasehold useless, the city and Mercantile ceased redevelopment plans because the entire project had been inadequately financed. The city had failed to secure a detailed financing plan from Mercantile as required by Section 29.080(15), Revised Code of St. Louis. Furthermore, although it was required under provisions of the City Charter to begin condemnation proceedings within six months after the effective date of the redevelopment ordinances

and although its agents told plaintiff to vacate the premises, the city has failed to commence official condemnation of plaintiff's leasehold.

II

[1-4] We review the dismissal of plaintiff's complaint in light of the following standards:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> [A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precision all elements that give rise to a legal basis for recovery. Finally, a complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action. That determination is properly made on the basis of proof and not merely on the pleadings.
>
> The question, therefore, is whether in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Jackson Sawmill Co. v. United States, 580 F.2d 302, 306 (8th Cir.) (citations omitted), *petition for cert. filed*, 47 U.S.L.W. 3278 (U.S. Oct. 24, 1978) (No. 75-585).

[5] The district court dismissed the complaint because plaintiff had failed to allege any physical invasion or appropriation of the property, stating:

> It is clear that plaintiff has failed to state a claim herein. Plaintiff does not allege that there has been any *physical entry* or *legal interference with its use or disposition of the property*. All that plaintiff asserts is the threat of condemnation, its impact upon the area, and its impact upon the business activities of plaintiff. While such facts may affect the date determined for the valuation of the property in any subsequent condemnation proceedings, such assertion is insufficient to state a claim herein.

(Emphasis added.) We do not agree with the district court that physical invasion or appropriation of the property is essential to a claim of de facto condemnation.

[6] While the mere declaration of blight and other initial steps authorizing condemnation, even if they result in a decline in property values, do not constitute a taking requiring compensation to the property owner, *Danforth v. United States*, 308 U.S. 271, 286, 60 S.Ct. 231, 84 L.Ed. 240 (1939), governmental action short of acquisition or occupancy may constitute a constructive or de facto taking "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter." *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945). *See also Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 561 F.2d 1327 (9th Cir. 1977):

> When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid.

* * * * * * *

> "[T]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference with or disturbance of property rights. * * * Nor need the government directly appropriate the title, possession or use of the properties . . . ."

Id. at 1330 (citations omitted).

In *Richmond*, the claimant's property was located within the area declared blighted by the city and designated for redevelopment. The redevelopment project was given wide publicity; a schedule for purchase of the subject properties was established, and the city's redevelopment agency began acquisition and demolition in the project area. As a result, property insurance and loan funds for improvements on the subject properties became unavailable. The claimant suffered damage to its building and a serious decline in rental income. After redevelopment ceased for lack of funds, the Ninth Circuit found that a compensable taking of the claimant's property had occurred because the actions of the city and its agency had rendered the property unsaleable in the open market and "its use for its intended purposes * * * severely limited." *Id.* at 1330.[2]

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[2] [A]s a result of Agency action, Elk's property was rendered unsaleable in the open market; its uses were severely limited by Agency; commercial lenders refused to make loans on the subject property; and Elks' peaceful enjoyment and its right to all rents and profits from the property were substantially impaired. *Given these consequences of Agency action, we conclude that Agency's interference with Elks' property rights was direct and substantial, and that the result of this interference was a significant reduction in the value of the subject property.* Therefore, we hold that Agency effected a compensable taking under the Fifth and Fourteenth Amendments of the United States Constitution.

Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327, 1331 (9th Cir. 1977) (emphasis added).

In *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964), the Sixth Circuit faced similar facts and reversed the lower court's dismissal of the complaint for failure to state a claim. The district court in the present action noted the *Foster* decision but considered it overruled or substantially restricted by two subsequent Sixth Circuit cases, *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir.), *cert. denied*, 419 U.S. 837, 95 S.Ct. 65, 42 L.Ed.2d 64 (1974) and *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir. 1970).

The district court cited the following language in *Sayre*:

> [A]bsent the extreme circumstances present in the *Foster* case, but lacking here, we think the true rule is that there is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties.

Sayre v. City of Cleveland, supra, 493 F.2d at 70. However, in *Sayre* and *Woodland*, the subject properties had *not* been designated for acquisition and were merely adjacent to but *outside* of the redevelopment area. In *Sayre*, the Sixth Circuit explained the significance of the property's location in determining whether property has been constructively condemned:

> *Woodland Market* acknowledges the authority of the legislative body to draw its own lines around the property it wishes to condemn by eminent domain. And the crucial geographic boundary is not that around the general planning area or the project area, *but around the property that the city has demonstrated that it intends to appropriate.* Absent the abuse of eminent domain found in *Foster, including some action by the city indicating that the particular piece of property at issue is to be appropriated,* economic loss caused by urban renewal does not constitute a taking within the meaning of the fifth and fourteenth amendments.

Id. at 69 (emphasis added).

In *Clinton Street Greater Bethlehem Church v. City of Detroit*, 484 F.2d 185 (6th Cir. 1973), the Sixth Circuit further explained the scope of its prior ruling in *Foster v. Herley, supra*, and the *Foster* decision on remand, *Foster v. City of Detroit*, 254 F.Supp. 655 (E.D.Mich.1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

> The *important distinction between the appellant's alleged harm and the problems encountered by Mr. Foster is that all of Mr. Foster's problems stemmed from his being subject to the 1950 condemnation action. See* 330 F.2d at 88. The affirmative acts of the City which led the District Court to conclude that a taking had occurred prior to 1962 were all actions taken by the City in accordance with a condemnation action which it later abandoned, and including informing Mr. Foster that he would receive no compensation for improvements, advising him only to "keep the roof on and the water running"; requiring him to sign a waiver of claim for damages as a condition precedent to the issuance of a building permit (but waiving any claim to the increased value of the property as a result of the proposed improvements), completing the condemnation and clearance of several blocks in the area, and keeping the notice of lis pendens in effect for five years after the issuance of the stop order on the project, while at the same time, telling those who inquired that the property would be condemned soon. 254 F.Supp. at 662.
>
> None of these factors pertain to this appellant, since this appellant was not subject to the 1950 condemnation action.

Clinton Street Greater Bethlehem Church v. City of Detroit, supra, 484 F.2d at 188 (emphasis added). *See also Benenson*

v. United States, 548 F.2d 939, 947-52 (Ct.Cl.1977); *Drakes Bay Land Co. v. United States*, 424 F.2d 574, 584, 191 Ct. Cl. 389 (1970).

We therefore find that the district court's interpretation of the requirements for a claim of de facto condemnation were too restrictive. Accordingly, we remand with directions to reinstate plaintiff's claim against the city for resolution on its merits.[3]

III

[7] The district court did not specify its reasons for dismissing plaintiff's claim against Manley. However, the action against Manley lacked an independent basis for federal court jurisdiction, and the federal claim against the city was dismissed before trial. Thus presumably the district court relied on the Supreme Court's statement in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

Because we reinstate Garland's claim against the city, one of the obstacles[4] to entertaining jurisdiction over plaintiff's action

[3] We suggest that on remand plaintiff should be permitted to file its amended complaint. In addition, we direct that on remand, the district court shall resolve the issue of the city's liability, if any, for the acts of Mercantile. The city disclaims any liability for the alleged de facto condemnation or abuse of the power of eminent domain, contending that its delegation to Mercantile of the power to condemn the subject property absolved the city of any further responsibility. Garland contends that Mercantile acted at all times as the city's agent.

[4] Plaintiff seeks to append its state-law claim against Manley, an ancillary defendant for whom no independent basis of federal jurisdiction is alleged, to plaintiff's federal question claim against the city. The claims are based on the same operative facts and circumstances. However, plaintiff has not asserted that Manley is a necessary party to resolution of the inverse condemnation claim against the city or that its claim against Manley involves a general federal question.

against Manley is removed. The district court should therefore determine whether, in light of the guidelines established in *Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), and *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), it may exercise ancillary, i.e., pendent party, jurisdiction over the state-law claim against Manley. If the court finds that this is a proper case for the exercise of ancillary jurisdiction, it must decide whether, under the Missouri law of frustration of purpose or impossibility of performance, plaintiff has stated a claim for cancellation of the remainder of its lease.

Reversed and remanded for further proceedings consistent with this opinion.

The Supreme Court has not yet indicated whether pendent party jurisdiction may be exercised when primary jurisdiction is founded on 28 U.S.C. § 1331(a). The district court should decide whether it has the power to assume ancillary jurisdiction over the claim against Manley, and if so, whether it should elect to do so. The issue may be clarified if plaintiff is permitted to amend its complaint to show, if it can do so, additional facts upon which it may rely to justify retaining Manley as an ancillary party.

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

No. 78-1554. September Term, 1978

Thomas W. Garland, Inc., Appellant,
vs.
The City of St. Louis and Manley Investment Company, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered separate petitions for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is now here ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is now here ordered that the petitions for rehearing also be, and they are hereby, denied.

It is further ordered that pages 10 and 11, attached hereto, will be substituted for page 10 of the original opinion.

May 15, 1979

APPENDIX E

United States District Court
Eastern District of Missouri
Eastern Division

Thomas W. Garland, Inc., a Missouri Corporation, Plaintiff,
vs.
The City of St. Louis, a Constitutional Charter City of the State of Missouri,
and
Manley Investment Company, a Missouri Corporation, Defendants.

No. 78-129 C (3)

ORDER

(Filed June 18, 1979)

Pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit,

IT IS HEREBY ORDERED that defendants' motions to dismiss be and are denied.

IT IS FURTHER ORDERED that plaintiff's motion to file its first amended complaint be and is granted.

IT IS FURTHER ORDERED that defendants shall answer within twenty days of this date.

IT IS FURTHER ORDERED that defendant City of St. Louis shall file a memorandum of law addressing the issue of the city's liability for the acts of Mercantile within twenty days of this date and that plaintiff and defendant Manley Investment Company shall respond within ten days thereafter.

/s/ JOHN F. NANGLE
United States District Judge

Dated: June 18, 1979.